

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ELVIN H. PERROW,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. '84-244

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of a denial of Application No. 21988 to appropriate surface waters from Wolf Creek, came on for formal hearing November 15, 1984, at Lacey, Washington. Seated for and as the Board were Wick Dufford, Lawrence J. Faulk, and Gayle Rothrock (presiding). The proceedings were officially reported by Marcia Erwin, Olympia Court Reporter.

Appellant appeared and represented himself. Respondent, Department of Ecology (DOE) appeared and was represented by Allen T. Miller, Jr., Assistant Attorney General.

1 Witnesses were sworn and testified. Exhibits were admitted and
2 examined. Oral argument was heard. A motion to dismiss the appeal by
3 respondent agency was argued and not granted.

4 From evidence, testimony, and contentions of the parties, the
5 Board makes these

6 FINDINGS OF FACT

7 I

8 The Board has jurisdiction over these persons and these matters.
9 RCW 43.21B.

10 II

11 The appellant, Elvin H. Perrow, maintains a home in the Methow
12 Valley near Winthrop on property abutting Wolf Creek. The creek
13 ultimately drains into the Methow River after traveling through
14 forested lands, pastures, meadows, and irrigated lands. Appellant
15 owns irrigable land and maintains some stock. He has maintained a
16 home on the land for fourteen years and observed the creek and its
17 uses for sixteen years.

18 III

19 In January of 1970, appellant Perrow applied to the Department of
20 Water Resources (predecessor agency to the DOE) for some additional
21 appropriation of surface water of 1.0 cubic feet per second (cfs) for
22 irrigation in Section 32, Township 35 North, Range 21 East, W.M. over
23 and above his domestic and stockwatering uses and his irrigation of up
24 to 60 acres in Section 31. His application was given the number SWA
25 21988. Appellant expresses a desire to use any such new appropriation

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 84-244

1 to water up to 30 acres of trees planted by him in the Seventies. In
2 testimony at hearing he asked for a reduction in his request from 1.0
3 cfs to .2 cfs flow.

4 IV

5 Waters of Wolf Creek have been well used for nearly a century and
6 have been subject to two adjudications, one commenced in the 1920's
7 but never completed and one commenced in 1970 and completed in 1984.
8 Appellant's application for 1.0 cfs for irrigation was not fully
9 processed in 1970 because of the immediately forthcoming second
10 adjudication (State of Washington, Dept. of Ecology v. John C. Holmes,
11 et al., Cause No. 18498 in Okanogan County Superior Court). E. H.
12 Perrow was a party in that cause. The applications for the creek were
13 also put on hold because of observable stresses on water availability
14 and a concern the creek might be fully appropriated already. Water is
15 not always visible in its lower reaches in the summer.

16 V

17 In accordance with requirements under the Water Resources
18 Management Act of 1971, chapter 173-548 Washington Administrative Code
19 (WAC) was promulgated by DOE pursuant to statutory authority, RCW
20 90.54. Chapter 173-548 WAC is the Methow River Basin Water Resources
21 Management Program which program was officially adopted by DOE in
22 December 1976, after public hearings and consultation with the Methow
23 Basin (citizens) Advisory Group.

24 That program closed the waters of Wolf Creek to further
25 consumptive appropriation year-round from its mouth to its

1 headwaters. The only exception is for water developed solely from
2 added storage capacity within the basin. (See WAC 173-548-050.)

3 VI

4 Pending completion of the comprehensive adjudication law suit,
5 applications for appropriation were continued in abeyance and none
6 were granted. When the results of Cause No. 18498 were finalized and
7 Certificates of Adjudicated Water Right were issued, Perrow was
8 confirmed .02 cfs for domestic use, 1.2 cfs for irrigation in Section
9 31 and for stockwater only in Section 32. Other historic
10 appropriators' rights were confirmed at the same time.

11 The DOE then finished processing applications held in abeyance,
12 reviewing the measured creek flows, instream values, the adjudicated
13 rights appropriation totals, the mandates of WAC 173-548, and finally,
14 making a site visit to the area to verify applications particulars,
15 stream uses, and the lay of the land and waters in mid-1984.

16 On August 20, 1984, the Department recommended denial of Perrow's
17 irrigation Application No. 21988. From this appellant appealed to the
18 Board on September 11, 1984.

19 VII

20 Any Conclusion of Law which is deemed a Finding of Fact is hereby
21 adopted as such.

22 From these Findings of Fact, the Board comes to these

23 CONCLUSIONS OF LAW

24 I

25 The procedure used by the Department of Water Resources, and its
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 84-244

1 successor agency the Department of Ecology, in relation to Mr.
2 Perrow's application, were documented, reasonable, and in accordance
3 with the requirements of chapter 90.03 RCW and chapter 90.54 RCW for
4 evaluating water appropriation applications for use of surface waters
5 of the state.

6 II

7 It is appropriate to hold applications for new appropriations in
8 abeyance during the pendency of adjudications of old appropriations.
9 In this case the wait was extremely long. However, this cannot
10 operate to change the basic criteria of RCW 90.03.290 by which
11 applications are judged. The delay was inconvenient, but not unlawful.

12 III

13 The Water Resources Act, chapter 90.54, RCW, directs the DOE to
14 develop programs for making decisions in future water resources
15 allocation and use. The DOE, after public hearings, adopted a water
16 resources program which closed Wolf Creek to further appropriation.
17 (See WAC 173-548). These regulations are reasonably consistent with
18 the statute they are designed to implement and are, thus, valid and
19 enforceable. RCW 90.54.900 does not raise a pending application to
20 the status of a perfected right. Therefore, it does not operate to
21 defeat the application of WAC 173-548-050. On the evidence presented,
22 we can find no error in the result reached by the DOE and conclude
23 that the DOE's decision should be affirmed. (See also PCHB No. 79-20.)

24 IV

25 Any Finding of Fact which is deemed a Conclusion of Law is hereby
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 84-244

1 adopted as such.

2 From these Conclusions, the Board enters this

3 ORDER

4 The denial of appellant's application to appropriate public waters
5 (Application No. 21988) is hereby affirmed.

6 DONE at Lacey, Washington, this 13th day of February, 1985.

7 POLLUTION CONTROL HEARINGS BOARD

8 
9 GAYLE ROTHROCK, Vice Chairman

10
11 (See Dissenting Opinion)
12 LAWRENCE J. FAULK, Chairman

13 
14 WICK DUFFORD, Lawyer Member

1 DISSENTING - FAULK

2
3 I write separately because I believe the result reached by the
4 majority is unjust to this citizen, unnecessary and certainly not
5 required by the law.

6 DOE confirms that they are uncertain as to the actual water usage
7 in Wolf Creek. The appellant indicated that the minimum relief sought
8 was .2 cfs for irrigation April through August of 20 acres of trees
9 planted in the 1970's.

10 The evidence shows that this applicant is below the other
11 diversions, thus he would only get water if it were available and
12 would not impair existing rights. DOE did not install a flow meter to
13 measure the actual flow of the creek. This should have been
14 accomplished if the Department is to meet one of the requirements of
15 RCW 90.54 which is to determine if water is available for
16 appropriation. Therefore, it seems to me that DOE should issue a
17 temporary prmit for appellant to utilize the water from Wolf Creek.
18 If the analysis of actual water in the creek, by flow meter, shows
19 there is water available for appropriation then they could finalize
20 appellant's temporary permit.

21 If on the other hand, there is not water available to serve the
22 confirmed water rights users, then DOE could regulate the water usage.

23 It seems to me our job is to interpret the law in a fashion that
24 results in justice.

25
26 DISSENT - FAULK
27 PCHB No. 84-244

1 Thus I would vacate the denial of surface water Application No.
2 21988 and grant the appellant .2 cfs of water for irrigation. This
3 seems to be a more reasonable and just approach.

4
5  2/13/85
6 LAWRENCE J. FAULK, Chairman